



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1998

Ms. Celina Romero
Clark, Thomas & Winters
P.O. Box 1148
Austin, Texas 78767

OR98-1565

Dear Ms. Romero:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116502.

The Uvalde County Underground Water Conservation District (the "district"), which you represent, received a request for a report, entitled "Uvalde Aquifer Test Analysis," that was submitted to support the McBryde transportation permit.¹ You raise no exception to disclosure on behalf of the district, and make no arguments regarding the proprietary nature of the requested information. You request our decision whether the requested information is excepted from disclosure. You have submitted the requested information to this office for review.

Pursuant to section 552.305 of the Government Code, we notified the attorney for William E. and Debra Lynn McBryde (the "McBrydes") of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. The McBrydes responded by asserting that the information requested contains trade secrets and confidential commercial and financial information excepted from disclosure under section 552.110 of the Government Code.

First, the McBrydes assert that only the information on file with the district at the time of the request is at issue. We agree. The Open Records Act does not require a

¹Although you have submitted the requested report and additional information to this office, we will only rule on the report that is the subject of the request.

governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983).

Second, the McBrydes contend that although the report analyzes both the Leona River Site and the Gorman Farm Site, only the portions of the report pertaining to the Gorman Farm Site are responsive to the request. We are unable to confirm this assertion.² Thus, if the request is only for portions of the report pertaining to the Gorman Farm Site, the district need not release the portions of the report pertaining to the Leona River Site as they are unresponsive. However, because the request may be for the entire report, we will rule on the basis of this assumption.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act, 5 U.S.C. § 552, when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain

²Disputed questions of fact are not resolvable in the open records process. Open Records Decision No. 554 (1990).

an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. *Id.*³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

After a review of the McBrydes' arguments and the information they seek to withhold, we agree that most of the information is excepted from public disclosure under the commercial and financial information prong of section 552.110. We have marked the information that the district must release as it is not excepted from public disclosure by either prong of section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

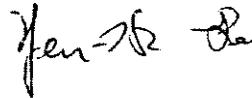
³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 116502

Enclosures: Marked documents

cc: Mr. Steve Cullinan
Chief, Water Resources
U.S. Fish and Wildlife Service
Regional Office
P.O. Box 1306
Albuquerque, New Mexico 87103
(w/o enclosures)

Mr. Joe M. Davis
Nunley, Davis, Jolley, Brock, Hill & Brant, L.L.P.
194 South Main, Suite 301
Boerne, Texas 78006-2372
(w/ submitted documents)